

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re ACCREDO HEALTH, INC.
SECURITIES LITIGATION

This Document Relates To:

ALL ACTIONS.

) Civil Action No. 03-2216-BBD

) CLASS ACTION

) LEAD PLAINTIFFS' MOTION *IN LIMINE*

) #16 TO PROVIDE CERTAIN

) PRELIMINARY JURY INSTRUCTIONS

)

Lead Plaintiffs, Louisiana School Employees' Retirement System and Debra Swiman (together, "Lead Plaintiffs") and the Class of investors who purchased Accredo stock between June 16, 2002 and April 7, 2003, respectfully ask the Court to provide certain preliminary jury instructions, pursuant to Fed. R. Civ. P. 51(b)(3).

According to Fed. R. Civ. P. 51(b)(3), "[t]he court . . . may instruct the jury at any time before the jury is discharged." Lead Plaintiffs request that the Court instruct the jury regarding: direct and circumstantial evidence; corporate entities as parties; class actions; a summary of the case; the purpose of the Securities Exchange Act of 1934; the definitions of recurring securities terms; and the burden of proof before evidence is presented, and ask the Court to re-read these instructions to the jury along with the other instructions at the close of the liability phase.¹

Instructing the jury prior to the presentation of evidence is likely to better assist the jury in understanding the case, and clarifies for the jurors their role:

An alternative procedure is to instruct jurors before evidence is presented, thus ***providing them with a framework within which to consider the evidence to come.*** Empirical research suggests that preliminary instructions increase juror satisfaction with trials, and assist jurors in following legal guidelines. Judges and attorneys also express satisfaction with preliminary instructions, reporting increased juror attentiveness during the proceeding due to clarification of both the jury's function and of the important issues at trial.²

Joe S. Cecil, Valerie P. Hans & Elizabeth C. Wiggins, *Symposium Issue on the Selection and Function of the Modern Jury: Article: Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 Am. U.L. Rev. 727, 770 (1991).

Black's Law Dictionary defines "direct" evidence as "evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." In

¹ Lead Plaintiffs have provided these proposed jury instructions to Defendants and counsel for the parties are presently meeting and conferring on mutually-acceptable instructions.

² All emphasis added and all internal quotations and citations omitted, unless otherwise noted.

contrast, “circumstantial” evidence is defined as “evidence based on inference and not on personal knowledge or observation.” Because the concepts of direct and circumstantial evidence and the burden of proof in a civil case are typically not well understood by jurors, instructions on these concepts before the presentation of evidence would assist jurors in more fairly evaluating the evidence as it is presented to them. *See* John C. Lowe, *Reinventing an Outdated Wheel: Innovations in Complex Litigation*, 2 Va. J.L. & Tech. 6 (1997) (“Particularly in a complex case, the judge should give **comprehensive** instructions in lay terms to the jury **before** opening statements.”) (emphasis is original).

Preliminary instructions are especially important in securities cases because, among other things, direct evidence is **not** required to show scienter: “[T]he proof of scienter required in fraud cases is often a matter of inference from circumstantial evidence.” *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 n.30 (1983); *New Eng. Health Care Employees Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 502 (6th Cir. 2003) (stating that, “direct evidence of scienter is not necessary to a determination of fraud” and “scienter may be proved with circumstantial evidence,” citing *Herman & MacLean* with approval); *see also Provenz v. Miller*, 102 F.3d 1478, 1490 (9th Cir. 1996) (“Scienter can be established by direct or circumstantial evidence.”).

Congress endorsed this view by requiring, in §21D(b)(2), only facts raising a “strong **inference**” of scienter, not direct proof. 15 U.S.C. §78u-4(b)(2). “Congress plainly contemplated that scienter could be proven by inference, thus acknowledging the role of indirect and circumstantial evidence.” *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 195 (1st Cir. 1999). “There does not appear to be any question that under the PSLRA circumstantial evidence can support a strong inference of scienter.” *Nathenson v. Zonagen Inc.*, 267 F.3d 400, 410 (5th Cir. 2001). As the Ninth Circuit recognized in *Ronconi v. Larkin*, 253 F.3d 423, 428 (9th Cir. 2001), “[u]nless reasonable inferences from circumstances suffice to get a case to a jury, the welfare of victimized

investors and the integrity of the stock market may be insufficiently protected from deceptive manipulators.”

Thus, at a minimum, the jury should receive a preliminary instruction that, “[s]cienter may be proven and pled by reference to circumstantial evidence, for it is rare that perpetrators of a fraud would confess outright.” *In re PeopleSoft, Inc., Sec. Litig.*, No. C 99-00472 WHA, 2000 U.S. Dist. LEXIS 10953, at *9 (N.D. Cal. May 26, 2000) (citing *In re Silicon Graphics Sec. Litig.*, 183 F.3d 970, 986 (9th Cir. 1999)). Similarly, the purpose of Lead Plaintiffs’ requested preliminary jury instructions would be to explain the concepts of direct and circumstantial evidence, to make clear for the jury that a corporate entity can serve as a party to a lawsuit, to define a class action and how it functions, to provide a summary of the case, to clarify the purpose of the Securities Exchange Act of 1934, to define certain recurring securities terms and finally, to explain the burden of proof. The overall goal of these preliminary instructions is to educate and orient the jurors to the central issues in the trial, so they may better understand the relevance and significance of the evidence as it is presented, rather than in retrospect at the conclusion of the trial.

Accordingly, Lead Plaintiffs request that the Court instruct the jury regarding: direct and circumstantial evidence; corporate entities as parties; class actions; a summary of the case; the purpose of the Securities Exchange Act of 1934; the definitions of recurring securities terms; and the burden of proof before evidence is presented, and ask the Court to re-read these instructions to the jury along with the other instructions at the close of the liability phase.

DATED: September 8, 2008

Respectfully submitted,

COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
MARK SOLOMON
TOR GRONBORG
JONAH H. GOLDSTEIN
DAVID W. MITCHELL
TRIG R. SMITH
NATHAN W. BEAR

s/ TOR GRONBORG
TOR GRONBORG

655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

BERNSTEIN LITOWITZ BERGER &
GROSSMANN LLP
BLAIR A. NICHOLAS
TIMOTHY A. DELANGE
BRETT M. MIDDLETON
MATTHEW P. JUBENVILLE
12481 High Bluff Drive, Suite 300
San Diego, CA 92130
Telephone: 858/793-0070
858/793-0323 (fax)

Co-Lead Counsel for Plaintiffs

GLASSMAN, EDWARDS, WADE
& WYATT, P.C.
B.J. WADE, #5182
26 N. Second Street Building
Memphis, TN 38103
Telephone: 901/527-4673
901/521-0940 (fax)

Liaison Counsel

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on September 8, 2008.

s/ TOR GRONBORG
TOR GRONBORG

COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
655 West Broadway, Suite 1900
San Diego, CA 92101-3301
Telephone: 619/231-1058
619/231-7423 (fax)
E-mail: torg@csgrr.com

Mailing Information for a Case 2:03-cv-02216-BBD-gbc

Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

- **George E. Barrett**
gbarrett@barrettjohnston.com
- **Nathan W. Bear**
NBear@csgrr.com,stremblay@csgrr.com
- **Saul C. Belz**
sbelz@glankler.com,apospisil@glankler.com
- **Paul Kent Bramlett**
pknashlaw@aol.com
- **Linda F Burnsed**
lburnsed@cbslawyers.net
- **Karen M. Campbell**
kcampbell@appersoncrump.com
- **F. Guthrie Castle , Jr**
fgc@castle-law.com
- **Stanley M. Chernau**
s.chernau@chernau.com
- **Timothy A. DeLange**
timothyd@blbglaw.com,brettm@blbglaw.com,samj@blbglaw.com,kristinas@blbglaw.com,matthe
- **Amy Ferguson Dudek**
adudek@glankler.com,apospisil@glankler.com
- **Jef Feibelman**
jfeibelman@bpjlaw.com,cbiscoe@bpjlaw.com
- **Tor Gronborg**
torg@csgrr.com,e_file_sd@csgrr.com
- **Douglas F. Halijan**
dhalijan@bpjlaw.com,mmarshall@bpjlaw.com
- **Dixie W. Ishee**
woodcarltonishee@bellsouth.net

- **Matthew P. Jubenville**
matthewj@blbglaw.com
- **Emily C. Komlossy**
ekomlossy@faruqilaw.com
- **Quitman Robins Ledyard , II**
bledyard@borodandkramer.com
- **Brett M. Middleton**
brettm@blbglaw.com
- **Timothy L. Miles**
tmiles@barrettjohnston.com
- **David W. Mitchell**
davidm@csgrr.com
- **Blair N. Nicholas**
blairn@blbglaw.com
- **Russell F.A. Riviere**
russellr@blbglaw.com
- **Kevin Hunter Sharp**
ksharp@dsattorneys.com
- **Scott N. Sherman**
scott.sherman@alston.com
- **Gary K. Smith**
gsmith@appersoncrump.com,clunsford@appersoncrump.com,kcampbell@appersoncrump.com
- **Trig R. Smith**
trigs@csgrr.com
- **Mark D. Trainer**
mark.trainer@alston.com
- **B. J. Wade**
bwade@gewwlaw.com
- **Allison Wannamaker**
wannamakera@thomasonlaw.com
- **Kelly C. Wilcove**
kelly.wilcove@alston.com,valerie.nouman@alston.com

Manual Notice List

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.

Ramzi Abadou

LERACH COUGHLIN STOIA GELLER RUDMAN & ROBBINS, LLP
655 West Broadway
Suite 1900
San Diego, CA 92101

Guri Ademi

ADEMI & O'REILLY, LLP
3620 East Layton Ave.
Cudahy, WI 53110

Shpetim Ademi

ADEMI & O'REILLY, LLP
3620 East Layton Ave.
Cudahy, WI 53110

Lauren S. Antonino

CHITWOOD & HARLEY
1230 Peachtree St., N.E.
2900 Promenade II
Atlanta, GA 30309

Peter Q. Bassett

ALSTON & BIRD
1201 West Peachtree St.
Atlanta, GA 30309-3424

Javier Bleichmar

BERNSTEIN LITOWITZ BERGER & GROSSMAN
1285 Ave of the Americas
38th Floor
New York, NY 10019

Martin D. Chitwood

CHITWOOD HARLEY & HARNES LLP
1230 Peachtree St., N.E.
2900 Promenade II
Atlanta, GA 30309

Patricia A. Connell

ERNST & YOUNG
5 Times Square
New York, NY 10036-6530

Gregory M. Egleston

BERNSTEIN LIEBHARD & LIFSHITZ, LLP
10 East 40th Street
New York, NY 10016

Nadeem Faruqi

FARUQI & FARUQI, LLP
369 Lexington Avenue
10th Floor
New York, NY 10017

Mark C. Gardy

ABBEY GARDY, LLP
212 East 39th St.
New York, NY 10016

Carol V. Gilden

MUCH SHELIST FREED DENENBERG AMENT & RUBENSTEIN, P.C.
191 N. Wacker Dr.
Ste. 1800
Chicago, IL 60606-1615

Karen M. Hanson

LOCKRIDGE GRINDAL NAUEN, PLLP
100 Washington Ave., South
Ste. 2200
Minneapolis, MN 55401

Ronald B. Hauben

ERNST & YOUNG
5 Times Square
New York, NY 10036-6530

Marc S. Henzel

LAW OFFICES OF MARC S. HENZEL
273 Montgomery Ave.
Ste. 202
Bala Cynwyd, PA 19004

Fred Taylor Isquith

WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP
270 Madison Ave.
New York, NY 10016

, Esq

Douglas S. Johnston

BARRETT JOHNSTON & PARSLEY
217 Second Avenue North
Nashville, TN 37201-1601

Nancy Kaboolian

ABBEY GARDY, LLP
212 East 39th St.
New York, NY 10016

William S. Lerach

LERACH COUGHLIN STOIA GELLER RUDMAN & ROBBINS, LLP
655 West Broadway
Suite 1900
San Diego, CA 92101

Mel E. Lifshitz

BERNSTEIN LIEBHARD & LIFSHITZ, LLP
10 East 40th Street
New York, NY 10016

Richard A. Lockridge

LOCKRIDGE GRINDAL NAUEN, PLLP
100 Washington Ave., South
Ste. 2200
Minneapolis, MN 55401

Douglas M McKeige

BERNSTEIN LITOWITZ BERGER & GROSSMAN
1285 Ave of the Americas
38th Floor
New York, NY 10019

Eitan Misulovin

BERNSTEIN LITOWITZ BERGER & GROSSMAN
1285 Ave of the Americas
38th Floor
New York, NY 10019

Michael E. Moskovitz

MUCH SHELIST FREED DENENBERG AMENT & RUBENSTEIN, P.C.
191 N. Wacker Dr.
Ste. 1800
Chicago, IL 60606-1615

Gregory M. Nespole

WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP
270 Madison Ave.
New York, NY 10016

, Esq**Darren J Robbins**

LERACH COUGHLIN STOIA GELLER RUDMAN & ROBBINS, LLP
655 W. Broadway
Ste. 1900
San Diego, CA 92101

Robert M. Roseman

SPECTOR ROSEMAN & KODROFF, P.C.
1818 Market St.
Ste. 2500
Philadelphia, PA 19103

David A. Rosenfeld

LERACH COUGHLIN STOIA GELLER RUDMAN & ROBBINS, LLP
200 Broadhollow Rd.
Ste. 406
Melville, NY 11747

Samuel H. Rudman

LERACH COUGHLIN STOIA GELLER RUDMAN & ROBBINS, LLP
200 Broadhollow Rd.
Ste. 406
Melville, NY 11747

Mark Solomon

LERACH COUGHLIN STOIA GELLER RUDMAN & ROBBINS, LLP
655 West Broadway
Suite 1900
San Diego, CA 92101

Marc A. Topaz

SCHIFFRIN BARROWAY TOPAZ & KESSLER, LLP
280 King of Prussia Road
Radnor, PA 19087